

International Trade Law Newsletter



Binding Rulings and Advisory Opinions

binding the Government by asking its opinion

Government rules and laws regarding import and export are Byzantine. Alice would find the Wonderlandish terrain familiar: rabbit holes, contradictions, and piles of nonsense.

The only thing missing seems to be humor.

There seems to be a working framework underneath it all, but the devil inhabits the dizzying details.

Thousands of pages of cross-indexing, annotations, and a provincial vocabulary so thick with esoterica that it makes the mind churn with confusion.

It's not that Government is intentionally seeking to confuse. To invoke Alice from the quotation above, the Government often has not fully thought through the rules that it imposes on all of us.

You (or your lawyer) can also force the Government to tell you what the law means.



Upon your request, the Government must provide you with a written opinion that explains its policy or that tells you whether your shipment or transaction is legal. These are called advisory opinions when you are exporting and ruling letters when you are importing. The Government does not like to be bound by advisory opinions (in fact, it claims it is not bound), but advisory opinions do in fact limit the Government. Advisory opinions are official interpretations and applications of the agency's rules and regulations, with wide application when

the Government makes them public. The Government may change policy reflected in an advisory opinion if the change does not contradict a regulation or statute. And it cannot change policy to someone's detriment if that person relied on the original advisory opinion no *ex post facto* or retroactive application, in other words. The agency may even be required to provide a notice and comment

opportunity to the public. Following an advisory opinion (assuming you provided the Government with full and accurate information to enable it to render a good one) is proof of your due diligence.

"An author doesn't necessarily understand the meaning of his own story better than anyone else."

Alice in Wonderland



CONTENTS

- 1 ADVISORY OPINIONS
- 3 PIRATE QUIZ
- 3 BROKER PILOT PROGRAM
- 4 PENALTY REDUCTION FOR SMALL BUSINESSES
- 4 EARTH CALENDAR
- 5 THE PENALTY BOX
- 6 CALENDAR
- 6 ABOUT GRVR

Get back issues at
www.exportimportlaw.com

CBP Ruling Letters

Advisory opinions are called binding rulings under US import law. When and how to get one are found in 19 CFR 177. CBP generously publishes its huge library (around 160,000) of rulings online for free. The Customs Rulings Online Search System (CROSS) is a searchable database of CBP rulings that can be retrieved based on simple or complex search characteristics using keywords and Boolean operators. You may even download an entire year's collection of rulings, a great option for when you are offline. Much of the collection deals with classification and country of origin. CBP may even allow you to present your case or questions in-person when you request a ruling. You are allowed to advocate and advance your position in a face-to-face meeting with agency officials, normally a rare opportunity and one that should not be overlooked.



BIS Advisory Opinions

The Bureau of Industry and Security (BIS) offers an elaborate method to request advisory opinions. The procedure is found at 15 CFR 748.3(c). Perhaps due to the privacy concerns of those requesting advisory opinions, or perhaps because of another reason not transparent to the public, BIS publishes very few of its advisory opinions. (www.bis.doc.gov/policiesandregulations/advisoryopinions.htm). It also often redacts the names of the parties involved. BIS publishes those opinions that it thinks are relevant widely to exporters. The problem is that the BIS does not send out news releases or email alerts when it posts a new advisory opinion. If you also consider that BIS appears to be posting advisory opinions more often than in the past (three in 2009), export compliance managers would do well to regularly check the BIS's advisory opinions online catalogue for new postings.

DOJ and the Foreign Corrupt Practices Act

The Department of Justice (DOJ) also has a formal advisory opinion procedure, codified in the Foreign Corrupt Practices Act (FCPA) Opinion Procedures found in 28 CFR 80. (www.usdoj.gov/criminal/fraud/fcpa/opinion/frgnrcpt.html).

The DOJ does not like hypotheticals, so avoid any “what ifs” please. DOJ also publishes advisory opinions. (www.usdoj.gov/criminal/fraud/fcpa/opinion/). DOJ tends not to redact the identity of the company requesting the advisory opinion. DOJ's advisory opinions can provide a great deal of legal analysis. Finally, DOJ does not say that your transaction is legal or does not require a license, but rather and more ominously, “the Department does not presently intend to take any enforcement action with respect to the Proposed Transaction.”

DDTC Advisory Opinions

Exporters may ask the Directorate of Defense Trade Controls (DDTC) for an advisory opinion on whether a particular export of defense articles requires a license. The governing regulation is 22 CFR 126.9. A request for an advisory opinion must be made in writing and must outline in detail the equipment, its usage, the security classification (if any) of the articles or related technical data, and the country or countries involved. The DDTC provides guidelines on its website plus a sample of the form you need to fill out. (www.pmddtc.state.gov/licensing/advisory_opinion.html)

How best to prepare an advisory opinion

It is not wise to view the advisory procedure as merely filling out a form. Think of any submission to the Government as an opportunity to advance your interests, especially when the law is ambiguous or when there is a great deal at stake. Sometimes it may be best not to ask for an advisory opinion/binding ruling. You may not have all the necessary facts or you suspect that the agency will render the latest in a string of decisions that don't benefit you. But requesting an advisory opinion/binding ruling is often a good idea. It helps insulate you from liability if you follow the advisory opinion. If you decide to file, don't exaggerate or fudge your case. Instead, be clear and concise in marshaling your facts, supported by your interpretation of what the law should be. In other words, enlist the services of an experienced lawyer, someone trained as a legal advocate.

Take The Pirate Quiz

With the daring rescue of Capt. Richard Phillips, skipper of the Maersk Alabama, from a band of Somali pirates, the world is again fascinated with all things pirate. But how much do you really know about pirates?

Take this 20 question quiz and find out. No registration is required. Your score will be revealed at the end.

www.exportimportlaw.com/may2009quiz/

Pirate Quiz



CBP Announces Broker Self-Assessment Pilot Program

The Importer Self-Assessment (ISA) Program allows a certified importer to avoid intrusive CBP audits and reduce the possibility of costly penalties if the importer has a proven history of using reasonable care and if the importer promises to self-audit regularly. There is now a counterpart program for customs brokers. CBP just announced that it is recruiting customs brokers to volunteer for the Broker Self-Assessment (BSA) Program. Unlike with the ISA Program, CBP does not clearly describe the benefits to customs brokers when they enroll in BSA or volunteer in the pilot program.

Here are the requirements to participate in the BSA Pilot:

1. Be a licensed customs broker for a minimum period of five years.
2. Be a member with full benefits of the C-TPAT.
3. Agree to comply with all applicable CBP laws and regulations.
4. Work in an automated environment through the ABI and ACE.
5. Possess a broker national permit.
6. Have and maintain a system of business records that demonstrates the accuracy of CBP transactions.
7. Complete a BSA Pilot Questionnaire and agree to:
 - a. Continue to maintain and update its internal controls;
 - b. Perform periodic testing of its internal control system based on risk;
 - c. Make appropriate adjustments to the internal controls system with an eye toward improvement;
 - d. Inform CBP, through certain voluntary disclosures permitted under the BSA Pilot, of deficiencies identified in periodic testing; and
 - e. Maintain an audit trail linking financial records to entries filed with CBP.

The CBP must receive your BSA Pilot application by May 27, 2009.

Money-saving tip: Small Business Regulatory Enforcement Fairness Act

It's tough enough for small businesses to compete in the market place against huge multinationals, especially during an economic slump. It can be equally difficult getting heard by or leniency from government agencies. Federal enforcement authorities often pick on small companies because it is more difficult for the small companies to defend themselves. Small businesses do not have the resources, time, or the sway in Washington, DC of their larger counterparts.



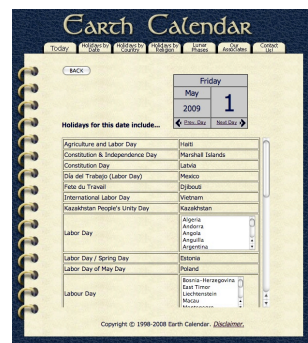
Thankfully, there is the Small Business Regulatory Enforcement Fairness Act (SBREFA) to help level the playing field. SBREFA creates a more cooperative regulatory environment between agencies and small businesses and requires impacted agencies to (1) perform a regulatory flexibility analysis when a final rule will have a significant impact on a substantial number of small entities; (2) "whenever appropriate", provide guidance to assist small businesses in complying with the agency's statutes and regulations and establish a program to respond to small business inquiries regarding such issues; and (3) establish a policy to provide for the "reduction, and under appropriate circumstances for the waiver" of civil penalties incurred by small businesses.

Federal agencies are required to comply with SBREFA. For example, US Customs and Border Protection (CBP) may waive or reduce civil penalties against you if, among other things, no fraud is involved, you relied to your detriment on CBP's erroneous advice, you are an inexperienced importer, or you can't afford the penalty. There is a paradox, however. Federal agencies generally do not like to tell small companies that the agencies are required to make special allowances for small companies. As with any other legal submission made to a federal agency, it is always best to have an experienced law firm make the penalty waiver argument on your behalf. Indeed, the fact that you were required to retain a lawyer is proof that you deserve penalty mitigation under SBREFA. You may also be surprised as to who qualifies as a "small business."

Earth Calendar - Nifty Website for Internationalists

It's a truism, but you really need to know the local culture wherever you're doing business. This is hard for people involved in international trade. Travel is sufficiently problematic without having to worry about local customs and holidays. Fortunately, one non-profit group has made it easier by creating the Earth Calendar, which recognizes cultural events from around the world. The calendar is free and online.

www.earthcalendar.net/index.php



THE PENALTY BOX

COMPANIES CAUGHT

Here is a roundup of the latest penalty cases against importer, exporters, manufacturers, and others.



US v Inn Foods, 560 F3d 1338 (Fed Cir 2009)

Food Importer Pays \$7.5 Million Penalty

Inn Foods did not deny its participation in double invoicing, paying its Mexican supplier a certain, true amount, and then using a second invoice from the Mexican supplier to pay lower duties on its imports to the USA. While Inn Foods did not deny the double-invoicing, it claimed that it amounted only in negligence, not fraud. The Court disagreed after viewing piles of evidence of collusion and found fraud. The Court was not impressed that Inn Foods, after CBP started its investigation, added a "for customs clearance only" disclaimer to its invoices. Inn Food's second argument similarly failed. It claimed that it could not be guilty of fraud under 19 US 1592(d) because only importers and sureties could be held liable under that provision, and the importer of record here was Inn Food's sister company (and no longer in existence), not Inn Foods. This was a bad argument that came back to bite not only Inn Foods, but allowed the court to create a rule with expansive application: anyone who aids and abets fraud violations under 1592(d) is equally liable. One lesson for importers is that penalty cases can take a long time to resolve. Here the transactions at issue occurred between 1987 and 1990, and the US Government filed its lawsuit against Inn Foods in 2001.

unlicensed exports of pipeline equipment

BJ Services pays \$800,000 to settle export violations

BJ Services of Houston, Texas, a pipeline equipment company, paid an \$800,000 penalty to settle sixty-seven export violations. The company made unauthorized shipments of valves and spare parts to Kazakhstan, Kuwait, Libya, Peru, Saudi Arabia, the United Arab Emirates and Venezuela. Under what math do 67 violations add to \$800,000? The BIS does not say. BIS's charging letter, sent before the parties settled, noted that BJ Services could pay up to \$250,000, but BIS was probably wrong. The violations took place before 2007 when that penalty amount was authorized. If the violations had taken place after 2007, the penalty amounts would have been much larger. The penalties may have been reduced because BJ Services voluntarily disclosed the violations.

Foreign Corrupt Practices Act)

Latin Node Pays \$2 million criminal fine

Latin Node, a high tech company, funneled \$1 million to third parties to bribe officials of Hondutel, the Honduran state-owned telecommunications company to land a government contract and favorable rates. Latin Node also bribed government officials in Yemen using a similar scheme. This case came to the attention of the Department of Justice when the buyer of Latin Node discovered the bribes, which had been approved by executives of Latin Node. Latin Node agreed to pay \$2 million in penalties.

US v 18th Century Peruvian Oils on Canvas, 597 F2d 618 (E.D. Va 2009)

Importer Forfeits Painting To Bolivia

The Cultural Property Implementation Act makes it illegal to deal in certain cultural artifacts. Here federal enforcement officials forced an importer to forfeit two paintings after someone recognized the paintings as museum pieces. The federal district court agreed that the importer should forfeit the paintings (to be returned to the Bolivian Government), which were valued at about \$60,000.

Price fixing air cargo shipments

Dutch Airline Executive Pleads Guilty

A Dutch executive of Martinair Holland (Martinair) pleaded guilty, will serve time, and pay a criminal fine for participating in a conspiracy to fix cargo rates for international air shipments. This is only the latest criminal case in an ongoing investigation. To date, 15 airlines and four executives have pleaded guilty to price fixing, paid \$1.6 billion in penalties, with three executives sentenced to jail time. According to the charge filed in U.S. District Court in the District of Columbia, Franciscus Johannes de Jong, aka Frank de Jong, the former vice president of cargo sales in Europe for Martinair, and his co-conspirators engaged in a conspiracy to fix the cargo rates charged to customers for international air shipments, including to and from the United States. De Jong will serve eight months in jail, pay a \$20,000 criminal fine, and cooperate with the ongoing investigation.

CALENDAR

Power Lunches - Free One Hour Workshops held in Irving, Texas

- Focused Assessments and Importer Self-Assessments
May 13, 2009, Wednesday, 12 noon - 1 pm Central
- Foreign-Trade Zones, US Customs Procedures and Requirements
June 17, 2009, Wednesday, 12 noon - 1 pm Central
- Customs Valuation
August 19, 2009, Wednesday, 12 noon - 1 pm Central
- Import Process and Best Practices
September 16, 2009, Wednesday, 12 noon - 1 pm Central
- Fines, Penalties, Forfeitures, and Liquidated Damages
October 14, 2009, Wednesday, 12 noon - 1 pm Central



Registration: Please provide full contact name, including title and company.

<http://www.exportimportlaw.com/forms/contact.html> or email info@exportimportlaw.com or call (214) 720-7720.

Year-round

The Best Customs Broker Exam Review Course

www.bestcustomsbrokercourse.com

GRVR Attorneys

Gonzalez Rolon Valdespino & Rodriguez, LLC, Attorneys

(214) 720-7720

info@exportimportlaw.com

www.exportimportlaw.com

Dallas · Washington, DC · San Antonio · Mexico City · Sao Paulo, Brazil · Paris, France

Our law firm has for two decades delivered excellent legal representation to our clients. With offices in six cities, four countries, and three continents, we can fill your legal needs regardless of your location.

Copyright Notice

This newsletter belongs entirely and completely to GRVR Attorneys. You may pass it along to others, but only if GRVR Attorneys receives full credit and attribution. ©GRVR Attorneys (2009).

Disclaimer

You will not find legal advice anywhere in this newsletter, on our website, or in any course or public lesson we offer. You should not rely on this newsletter to decide on a legal course of action. If you would like legal advice, ask your attorney. GRVR Attorneys provide legal advice only to existing clients in a confidential and private setting, not in public (e.g., not in a newsletter). Subscribing to our newsletter does not make you a client. If you would like to hire us, please contact us.